In the High Court of Punjab and Haryana at Chandigarh

R.S.A. No. 388 of 1980

Date of Decision: 26.12.2007

Rahim Din and others

…Appellants

Versus

Faqir Mohammad

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

Present: Mr. Amarjit Markan, Advocate,
for the defendants-appellant.

Mr. J.R. Mittal, Senior Advocate, with
Mr. Kashmir Singh, Advocate,
for the plaintiff-respondent.

JUDGMENT

M.M. KUMAR, J.

This is defendants' appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for brevity, 'the Code') challenging concurrent findings recorded by both the Courts below holding that the plaintiff-respondent is the real brother of the defendants-appellant and is entitled to 1/4th share in the property in question. Therefore, suit for possession was decreed and preliminary decree for possession of 1/4th share in the property in dispute through partition was passed in favour of the plaintiff-respondent. The defendants-appellant have claimed that the following substantial questions of law would arise for determination of this Court:

(i) Whether the findings contained in the impugned judgment are perverse, as they have illegally discarded

the memorandum of partition dated 11.6.1967 (Mark-A) executed between brothers; on the ground of absence of pleadings?

(ii) Whether the memorandum of partition dated 11.6.1967 (Mark-A) signed by all the brothers i.e. plaintiff and defendants has been illegally discarded, especially when the defendants-appellants were allowed to lead their evidence to prove the same by examining DW-1 to DW-7?

(iii) Whether the findings of lower appellate court qua dismissing application under Order 6 Rule 17 CPC for amendment of written statement, as it will change nature of defence are perverse and the same are liable to be set aside in the light of judgment of Hon'ble the Supreme Court in the case of **Usha Balashaheb Swami v. Kiran Appaso Swami, 2007 (2) RCR (Civil) 830**?

(iv) Whether both the courts below should have relied upon memorandum of partition (Mark-A) in order to ensure peace and harmony between brothers, by ignoring technicalities etc. as held under para no. 43 to 45 of the judgment of Hon'ble the Supreme Court in the case of **Hari Shankar Singhania v. Gaur Hari Singhania, 2006 AIR SCW 3330**?

(v) Whether the suit of the plaintiff is liable to be dismissed because of non joinder of necessary parties i.e. sisters of the parties?

Brief facts of the case are that the plaintiff-respondent filed a suit for possession through partition of 1/4th share of two houses detailed as under:

"a) One house consisting of one hall, one bathak, one Chubara, one kitchen, one Deorhi and court yard bounded as under:-

East: street, West: house of Babu ghamiar and house of Sardara, North: houses of Noor and Wali, South: thoroughfare, situated in village Dahliz Kalan, tehsil Malerkotla;

b) One house consisting of one room bounded as under:-

East: Panchayat Ghar, West: Yussaf, North: thoroughfare, South: plot Baisakhi situated in village Dahliz Kalan, tehsil Malerkotla."

The plaintiff-respondent has claimed that he and defendants-appellant are real brothers and the property in dispute was in joint possession of the parties. It was pleaded that the plaintiff-respondent was in possession of 1/4th share whereas the defendants-appellant were occupying 3/4th share. Since the plaintiff-respondent did not want to keep the suit property joint with the defendants-appellant, he instituted the aforementioned suit. While appearing as PW1, the plaintiff-respondent in his cross examination stated that his father Rahim Bakash was having two wives, namely, Kaki and Bakshi. He was born out of lions of Rahim Bakash and Kaki whereas the defendants-appellant were born from the

second wife of Rahim Bakash, namely, Bakshi. This version of the plaintiff-respondent was also supported by Shri Nahar Singh, DW1. The defendants-appellant examined a number of witnesses including Nahar Singh, DW.1, Ram Chand DW.2 and Ram Rachhpal DW.3, who deposed that property left by Rahim Bakash was partitioned between the parties and a partition deed was accordingly got executed. However, an objection was raised by the counsel for the plaintiff-respondent that since the said partition deed was not a registered document, the same could not be looked into and exhibited in terms of Section 49 of the Indian Registration Act, 1908.

On the basis of evidence led by the parties, the learned Trial Court has recorded a finding that no specific plea was taken by the defendants-appellant in their written statement that property in dispute had been partitioned between the parties and the partition deed Mark 'A' is not admissible in evidence. Learned Trial Court concluded that the plaintiff-respondent and the defendants-appellant are sons of Rahim Bakash and the plaintiff-respondent is entitled to 1/4th share in the property in suit. Accordingly, a preliminary decree dated 15.6.1978 was issued in favour of the plaintiff-respondent.

Feeling aggrieved, the defendants-appellant filed an appeal before the lower Appellate Court. The arguments in the aforementioned appeal were concluded on 7.2.1979 and orders were reserved. However, on 8.2.1979, the defendants-appellant filed an application under Order VI Rule 17 of the Code seeking amendment of the written statement with permission to plead that there has been a partition between the parties and in terms thereof the plaintiff-respondent is not entitled to the share in the

houses. The aforementioned application was dismissed by the learned lower Appellate Court vide order dated 13.11.1979, holding that a new plea was sought to be introduced by the amendment which would completely change the nature of the defence. The learned lower Appellate Court has referred to various judgments and concluded in the aforementioned terms in its order dated 13.11.1979, as is discernible from the following extract:-

> "5. ……Giving my due consideration to the matter I feel that the amendment in the present case is not justified in as much as the appellants are trying to set up a new case contradictory to the case originally propounded. No doubt the case of Hari Chand v. Het Ram [1978 PLR 458 (SC)] supports the argument of the learned counsel, the facts of the case M/s Ganesh Trading Company supra are distinguishable. In that case the suit was instituted by one of the partners of the dissolved firm but it was not mentioned as to in which capacity the suit has been filed. The amendment was sought to correct that defect. Otherwise Their Lordships ruled that if the plaintiff seeks to alter the cause of action itself or to introduce indirectly through an amendment of his pleadings an entirely new and inconsistent cause of action amounting virtually to the substituting of a new plaint or a new cause of action in place of what was originally there the court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. In the case of Dia Ram

supra no new case was set up and in fact it was a case of an additional ground in addition to the already existing grounds to defeat a claim for pre-emption. It was under those circumstances that the amendment was held to be justified.

6. On the other hand, the view expressed by our own High Court in Kundan Lal Verma v. Shushila Devi, 1971 Current Law Journal 1024, is that the amendment by means of which a party seeks to set up a new case or a new cause of action is not permitted. A similar view has been expressed in the case of Haji Mohammed Ishaq v. Mohammed Iqbal and another, 1978 U.J. (Supreme Court) 474, in which Their Lordships of Supreme Court held that the amendment of the written statement sought was on such facts which if permitted to be introduced by way of amendment would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken either at the time of dealings between the parties or in the original pleadings. The amendment was therefore held to have been rightly refused by the High Court."

Consequently, the lower Appellate Court also dismissed the appeal concurring with the findings of the learned Trial Court, vide order dated 27.11.1979. Likewise, the main appeal was also dismissed by the learned lower Appellate Court by banking upon the findings of the learned Trial Court. The document Mark-A, which was sought to be tendered in evidence, had not been considered by the Trial Court and the learned lower

Appellate Court also refused to consider the same as no foundation providing the base for admission of document Mark-A in evidence was laid in the pleadings. The view of the learned lower Appellate Court is discernible from paras 5 and 6 of the judgment dated 27.11.1979, which is as under:-

> "5. The learned counsel for the appellants tried to argue that the lower court has failed to appreciate the evidence on the record in as much as the document mark A has not been admitted into evidence and according to that document partition between the parties is proved. Without discussing the admissibility of the documents I am of the opinion that the argument is not tenable in as much as there is no plea in the written statement filed by the appellants in the lower court to that effect. In fact the appellants tried to make up the deficiency during the course of the appeal by filing an application for amendment of the written statement which has been already disallowed by me.
>
> 6. In the absence of any pleadings to that effect the argument propounded by the learned counsel cannot be considered and the learned counsel could not point out any provision of law or case law on the point."

The aforementioned both the orders passed by the learned lower Appellate Court, namely, orders dated 13.11.1979 and 27.11.1979 are subject matter of the instant appeal.

I have heard both the learned counsel.

Mr. Amarjit Markan, learned counsel for the defendants-appellant has submitted that the reasoning adopted by the lower Appellate Court is contrary to the views expressed by Hon'ble the Supreme Court in the case of Usha Balashaheb Swami (supra), wherein their Lordships' have held that in the cases of amendment of a written statement, the defendant is entitled to set up even a new plea in defence and is also entitled even to plead inconsistent stand. It has further been held that even an admission in the pleadings can be explained and inconsistent pleas can be set up in amendment petition even after taking a definite stand in the written statement. According to the learned counsel the impugned orders passed by the learned lower Appellate Court are, thus, liable to be set aside.

Mr. J.R. Mittal, learned senior counsel for the plaintiff-respondent has pointed out that application for amendment was filed on 8.2.1979 when arguments in the appeal were heard on 7.2.1979 and the orders were reserved. According to the learned counsel the grounds of appeal before the lower Appellate Court are contrary to the averments made in the application for amendment. He has referred to ground Nos. 7, 8 and 9 of the appeal to show that the plea taken in the application for amendment is self-destructive and cannot co-exist. In paras 7 and 8 of the grounds of appeal, the defendants-appellant have asserted that house at Item '(b)' was purchased by the defendants-appellant during the preceding four to five years for Rs. 80/- from Mohd. Bakash son of Asharfi, which has been constructed by the defendants-appellant. It has been asserted that the plaintiff-respondent has no concern with this house. The plaintiff-respondent has not spent a single penny. In para 9 it has been asserted that there is another house which has not been partitioned and the plaintiff-

respondent is in possession of that house and the same has not been made subject matter of dispute in the suit deliberately. Mr. Mittal has also referred to the partition deed, dated 11.6.1967 (Mark 'A') to submit that it talks of only one house and some land and the other house which is sought to be put in picture does not figure in the aforementioned document. He has also submitted that the partition deed is an unregistered document, which cannot be tendered in evidence.

Another submission made by Mr. Mittal is that final decree has already been passed by the Trial Court in 1981, which has been stayed in pursuance to the interim order passed by this Court in the instant appeal. According to the final decree, a sum of Rs. 200/- is required to be paid by the plaintiff-respondent to the defendants-appellant in lieu of his 1/4th share decreed in favour of the plaintiff-respondent. Learned counsel has maintained that no useful purpose would be served by re-opening the issues which have been foreclosed about 30 years ago.

After hearing learned counsel for the parties, the only question which emerges for determination in this case is as follows:-

> Whether in the facts and circumstances of the case it would be permissible in law to allow the defendants-appellant to amend the written statement so as to provide a basis for adducing evidence in the form of Mark-A?

There are concurrent findings recorded by both the Courts to the effect that the plaintiff-respondent like the defendants-appellant are the sons of one Rahim Baksh from two different wives. It has further been held that the plaintiff-respondent is son of Kaki from the loins of Rahim Baksh and the defendants-appellant are the sons of Bakshi, who was the

second wife of Rahim Baksh. Therefore, the plaintiff-respondent was held entitled to 1/4th share in the suit property. Accordingly a preliminary decree dated 15.6.1978, has already been passed in favour of the plaintiff-respondent and a final decree has also been passed by the Trial Court on 8.6.1981. It is appropriate to notice that this Court vide order dated 10.12.1980 had only stayed dispossession of the defendants-appellant subject to their furnishing security for *mesne* profits to the satisfaction of the executing Court within a period of six weeks. Interim order dated 10.12.1980, passed by this Court reads thus:-

> " It is agreed that passing of the final decree be not stayed but the dispossession of the appellants be stayed subject to their furnishing security for mesne profits to the satisfaction of the executing Court within a period of six weeks. It is further agreed that the security be accepted after notice to the respondent. I order accordingly. In case the appellants fail to furnish the security, the stay order shall stand vacated."

The final decree, dated 8.6.1981, which has been prepared, could be executed and only a sum of Rs. 200/- is required to be paid by the plaintiff-respondent to the defendants-appellant in lieu of his 1/4th share decreed in favour of the plaintiff-respondent.

The amendment to the written statement in the facts and circumstances of the case cannot be permitted because even if the amendment is allowed the document Mark-A is not in consonance with the import of the amendment sought to be incorporated. In the application for amendment of the written statement, filed under Order VI Rule 17 C.P.C.,

the defendants-appellant have prayed for additions of few sentences at the end of para 2, which when translated reads 'especially when the disputed land and the property in question stand partitioned. In that regard partition deed dated 11.6.1967 has already been executed'. However, in ground 7, 8 and 9 of the Memorandum of Appeal before the first Appellate Court, the defendants-appellant have asserted that house shown at Item No. (b) was purchased during the preceding 4/5 years from one Mohd. Baksh son of Ashraf, resident of Dahliz Kalan, for Rs. 80/- and that the plaintiff-respondent had no concern with the aforementioned house. In other words, the date of purchase of the house has to be regarded somewhere in 1973/1974 as the Memorandum of Appeal was prepared in 1978. It has further been asserted in ground No. 8 that house described at Item No. (a) has been constructed by the defendants-appellant after the death of their father and the plaintiff-respondent did not spent a single penny. If the partition, as per the assertion made in the amendment application, had already taken place as per Mark-A then such pleas taken in the Memorandum of Appeal in paras 7, 8 and 9 would not be necessary and the same are self-contradictory. A further perusal of para 9 of the Memorandum of appeal would further show that the defendants-appellant have also asserted that there is some other house, which has not been partitioned and the same has not been included by the plaintiff-respondent deliberately in the proceedings before the Court. The aforementioned house is stated to be in possession of the plaintiff-respondent. Moreover, the partition deed (Mark-A), dated 11.6.1967 talks only of one house and some land. There is no other house in picture, which is sought to be

introduced by the amendment. Moreover, the application for amendment was filed on 8.2.1979, after the arguments were heard and the orders were reserved on 7.2.1979 by learned lower Appellate Court. The partition deed is also an un-registered document and it is doubtful as to whether such a document could be read in evidence by accepting the same, as the bar of Section 49 of the Registration Act, 1908, would be attracted.

It is also pertinent to notice that Hon'ble the Supreme Court has repeatedly noted with caution that concurrent findings of fact cannot be interfered with even if such findings are unsatisfactory. Hon'ble the Supreme Court in a recent judgment in the case of **Gurdev Kaur v. Kaki, (2007) 1 SCC 546**, has went into the whole history of Section 100 of the Code, its interpretation given by the Privy Council in the case of **Durga Choudhrain v. Jawahir Singh Choudhri, (1890) 17 Indian Appeal 122 (PC)**, wherein it was held as early as 1890 that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however, gross or inexcusable the error may seem to be. Their Lordships' have further considered a subsequent judgment of the Privy Council in the case of **Ramratan Sukal v. Nandu, (1891) 19 Indian Appeal 1**. The judgment further considered the whole gamut of case law in the era belonging to pre 1976 and the post 1976 alongwith 54th Report of the Law Commission submitted in 1973 and concluded in paras 69 and 70 as under:-

> " 69. The analysis of cases decided by the Privy Council and this court prior to 1976 clearly indicated the scope of interference under Section 100 CPC by this Court.

Even prior to amendment, the consistent position has been that the courts should not interfere with the concurrent findings of facts.

70. Now, after the 1976 amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 CPC only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the section is that the appeal shall be heard only on that question."

In light of the aforementioned legal position it is not possible to set aside the concurrent findings of fact recorded by both the Courts below merely on the ground that document Mark-A is to be admitted in evidence and then the findings are to be recorded by interpreting the amendment. In a given case, the exclusion of a document from the evidence may constitute a substantial question of law but then such a document on scrutiny must be found to have bearing on the findings. as already observed in the preceding para that inclusion of document Mark-A in evidence would not make any material difference. Moreover, things have gone very far as even final decree has been drawn, which is to be given effect on deposit of Rs. 200/- by the plaintiff-respondent. Therefore, there is no room to allow the application for amendment and the view taken by the lower Appellate Court in its order dated 13.11.1979, rejecting the application for amendment is the correct view. Likewise, the view taken in the main appeal in the judgment and decree dated 27.11.1979, upholding the findings recorded by the Trial Court does not warrant interference of this Court.

The argument of the learned counsel for the defendants-appellant based on the judgment of Hon'ble the Supreme Court in the case of Usha Balashaheb Swami (supra) cannot be accepted because the facts and circumstances of the present case are substantively different. In that

case, the amendment in the written statement was sought at the stage of the Trial and there were no circumstances like the one present in the instant appeal. The amendment application was filed on 8.2.1979 after the arguments have been heard and the order was reserved on 7.2.1979 by the learned lower Appellate Court. Moreover, the document Mark 'A' is not consistent with the pleas taken in the Memorandum of Appeal. The conduct of the defendants-appellant in grossly denying even the relationship with the plaintiff-respondent is also not appreciable. Therefore, allowing the amendment at this stage cannot be supported by the judgment of Hon'ble the Supreme Court rendered in the case of Usha Balashaheb Swami (supra), which would not be attracted and applied to this case.

In view of the above, this appeal fails and the same is dismissed.

(M.M. KUMAR)
JUDGE

December 26, 2007

Pkapoor

FIT FOR INDEXING